EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106830/2020 (V)

Held in Glasgow by CVP on 12, 13 and 14 April 2021

Employment Judge Murphy (sitting alone)

Mr S Anwar	**Claimant** **In Person**
Pizza Cake Ayr Ltd t/a Domino's Pizza	**Respondent** **Represented by** **Mr S Robinson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claim of unfair dismissal does not succeed and is dismissed.

REASONS

Introduction

1. This final hearing took place remotely by video conferencing. The parties did not object to this format. A face-to-face hearing was not held because of the Covid 19 pandemic and issues were capable of determination by a remote hearing.

2. The claimant complained of constructive unfair dismissal. The respondent denied that it had fundamentally breached the claimant's contract or alternatively that, if it had done so, the claimant had waived or affirmed the breach. In the ET3, the respondent averred that, if the claimant was constructively dismissed, the respondent had a fair reason for

dismissal, namely some other substantial reason. However, the respondent's representative clarified at the outset of the hearing that the respondent no longer relied upon any 'SOSR' defense.

3. The claimant gave evidence on his own behalf and led evidence from Michael McElroy (**MM**), who worked for the respondent as a driver and in their Ayr store between 2016 and 2020.

4. The respondent led evidence from a number of employees as follows:

   a. Stephen Cope (**SC**) former Assistant Manager at the respondent's Ayr store and current Store Manager at their Prestwick store;

   b. Raza Hafiz (**RH**), Store Manager at the respondent's store in Ayr;

   c. Denis Smith (**DC**), Regional Manager for the respondent; and

   d. Eddie Stimpson (**ES**), Operations Manager for the respondent.

5. Evidence was taken orally from all witnesses. A joint set of productions was lodged running to 195 pages, to which approximately ten further pages were added by parties during the course of the hearing.

Issue to be determined

6. The issues to be determined in this case were:

   1) Did the following acts or omissions of the respondent individually or cumulatively breach the so-called implied term of trust and confidence (more fully defined at paras **90 and 91** below and referred to interchangeably in this judgment as the 'trust and confidence term' or the '**Malik** term')?

      i. A telephone call by Raza Haviz on or about 19 June 2020 when Mr Hafiz is alleged to have told the Claimant, on the instruction of higher management, to either quit his job with Just Eat or be dismissed by the respondent;

ii. Alleged aggressive conduct by David Cameron, Area Manager, during the disciplinary investigation meeting with the claimant on 14 July 2020;

iii. The findings and conclusions in Mr Hafiz's investigation report, sent to the claimant on 28 July 2020 that the claimant had behaved in a fraudulent manner and breached the respondent's trust;

iv. The upholding of the allegations against the claimant by the respondent's Chris Maxfield following a disciplinary hearing on 7 August 2020 and the issue of a final written warning on 12 August 2020;

v. The alleged failure by Chris Maxfield in so doing to access Government Guidance on the furlough scheme rules and to take into account the claimant's alleged concerns about Covid security in the Ayr store;

vi. The alleged failure by the respondent to provide an unreserved apology to the claimant following his successful appeal against the final written warning and his subsequent email dated 3 September 2020 to ES;

vii. The failure by ES to provide any further apology following receipt of the claimant's email dated 9 September 2020.

7. If so, was the claimant constructively unfairly dismissed pursuant to section 95(1)(c) of the Employment Rights Act 1996 ("ERA")?

8. If so, should an award of compensation be made? The claimant confirmed during his evidence that he had no losses arising from the termination of his employment, and as such, he sought only a basic award and compensation for loss of statutory rights.

Findings in Fact

9. The following facts were found to be proved.

10. The respondent is a franchisee, operating 18 pizza take-away and delivery outlets, including one in Ayr. Domino's Pizza Group ("DPG") is the franchisor.

11. The claimant was employed by the respondent from 2 December 2011 until he resigned with immediate effect on 24 September 2020. He was employed as a delivery driver operating from the Ayr store, but also undertook in-store duties in that store and was cross-trained on most of the tasks required of in-store employees.

12. He was provided with various statements of terms and conditions throughout his employment. A new statement was issued annually to record an increase in the claimant's rate of pay in accordance with the national minimum wage. Each one was said to supersede all previous agreements. The most recent statement of terms and conditions was dated 1 April 2019.

13. Under the terms of the most recent Statement and previous iterations, the claimant had no fixed hours of work. It was express that no guarantee was given that any minimum amount of work would be offered. It was also a written term of the contract that the claimant must work "any shift pattern required by the [Respondent]".

14. Although the 2019 Statement of Terms and Conditions, like its predecessors, referred extensively to a staff handbook, the claimant had not been provided with a copy of the handbook until in or around June 2020, when he requested a copy from the respondent in the course of disciplinary proceedings against him.

15. The claimant signed an acknowledgement of receipt of the Statement of Terms and Conditions and of the Staff Handbook in the 2019 Statement and had signed similar acknowledgements in previous iterations. He did so without reading the Statements he was signing. Whenever the respondent issued a new Statement of Terms and Conditions, the claimant was called into the store office by a manager and asked to sign the new version on the spot. He was never provided with a copy of the handbook on these occasions. He was given limited opportunity to read the updated Statement on these occasions.

16. The handbook provided to the claimant in June 2020 in response to the Claimant's request included the following provision.

> *You must devote the whole of your time and attention and abilities during your hours of work to the Company. You must not, whether directly or indirectly, undertake any other duties whatever kind [sic], during your hours of work.*
>
> *If you plan to take up additional employment outside of your normal working hours, you must discuss the nature of the additional employment with your manager in order to comply with the Working Time Regulations 1998. This is to assess the effect that the additional employment will have on your ability to perform your work for the Company….You may not, during the course of your employment, work for any business or company that is directly in competition with the Company.*

17. While employed by the respondent, the claimant also worked for Amazon as a logistics driver. He worked for them 3 days per fortnight from June 2019 until around late February 2020. Declan Smith, the store manager in Ayr at the time, and Graham Frame, assistant manager, both knew of the claimant's work for Amazon.

18. In or about February 2020, in addition to his work for the respondent and Amazon, the claimant began working as a delivery driver for Just Eat. Initially he did around 15 hours per week for Just Eat which he fitted around his shifts for the respondent and Amazon. Shortly thereafter, he gave up his work for Amazon.

19. By this time, there had been a change of store manager in Ayr and the role was undertaken by Raza Hafiz (RH). The claimant told RH about his work for Just Eat and Amazon and RH sought to accommodate him by allocating hours that would supplement his hours for Just Eat. The claimant normally worked for the respondent between 11 am and 7pm at this time, and fitted his shifts with Just Eat in the evenings and his shifts with Amazon on his days off.

20. Graham Frame also knew in February 2020 that the Claimant was working for Just Eat. Stephen Cope (SC), the shift manager at the store, was similarly aware. SC himself was working for Uber as well as the respondent at the material time. Denis Smith (DS), the respondent's Regional Manager, likewise knew that the claimant was working for Just Eat.

21. At this time, no manager of the respondent had indicated to the claimant that he could not or should not work for other employers. Other employees in the store worked for other businesses and were known by management to do so.

22. In February 2020, the claimant's wife fell pregnant with their second child. She suffered extreme morning sickness in respect of which she would later require to be admitted to hospital on more than one occasion. She developed these symptoms from February 2020 and was sick between 30 and 40 times a day. She was carefully monitored by her midwife and doctor.

23. Shortly after the national lockdown was announced on 23 March, Just Eat suspended its operations. By this time, the claimant had ceased to work for Amazon. RH and SC were both aware that Just Eat had ceased their operation and that, for this reason, the claimant was working only for the respondent in the period from late March 2020.

24. The claimant was unhappy about the arrangements for social distancing in the Ayr store during this early period of the pandemic. Higher management had directed that measures be put in place to mitigate risks and DPG, the franchisor, prepared a 'Covid Game Plan' which was circulated to stores. It set out precautions to be taken.

25. In the period from late March to late April 2020, these precautionary measures were not always followed in the Ayr store, particularly during peak periods such as Saturday evenings. The Game Plan indicated a reduced number of people should work on the make line but this was found to be impractical, given the volume of orders received. During peak trade times there was inadequate distancing between colleagues on the makeline due to the number of people working on pizza preparation to meet demand. Two or three people sometimes worked at the oven and did not maintain a distance of two metres, or indeed sometimes of one metre.

26. When the store was busy, drivers required to leave their cars to enter the store to pick up deliveries. Although the respondent introduced a runner service whereby a member of staff was to deliver orders out to the drivers in their vehicles, some drivers still required to enter the store to pick up orders, leading to additional footfall. Three people, including the claimant himself, often worked on putting away deliveries, which

appeared to be contrary to the best practice set out in the respondent's Game Plan. This indicated only one individual should be allocated this ask in an average sized store.

27. The claimant did not raise all of his concerns with the respondent at the time, but he did raise some concerns with RH. This he did on an informal ad hoc basis.

28. The claimant was unhappy to see a colleague who had recently been fined by the police for travelling in a car with four or five friends from different households congregating once again with those friends in the carpark outside the store. He reported this behaviour to Ms Wright who instructed the colleague to go home. The claimant was disappointed that the same colleague returned to work within a few days. He mentioned this unhappiness to RH. He did not raise any formal complaint or grievance.

29. In late April 2020, the claimant met his wife's midwife when delivering pizza to her from the respondent. She recognised him from midwifery appointments and told him that his wife, as a pregnant person, was in the shielding category. She told him that he should be eligible for furlough and recommended he consider this.

30. The respondent was permitted under the lockdown rules to continue to trade. It did not require, from a business perspective, to furlough staff owing to any downturn in business resulting from the pandemic. On the contrary, demand for its pizza delivery service was high.

31. The respondent agreed, however, to place a relatively small number of its employees on furlough leave in response to requests arising from their particular circumstances.

32. The claimant approached the store's assistant manager, Sophia Wright, to enquire about furlough. He told her what the midwife had said and asked if she would check with HR whether he could be furloughed. He told her that his wife needed to shield. He did not tell Ms Wright that he needed to shield. Rather, he told her that, even if the respondent was willing to furlough him, he may not take this up due to his financial position. At the time the conversation took place, the claimant was not working for any other business.

33. The claimant did not receive any written communication from the respondent concerning furlough but was later told that his request for furlough had been approved. Following this confirmation, he completed his rota'd shifts that week before commencing furlough leave on or about 26 April 2020. He remained on furlough leave until his employment terminated in September of that year.

34. The official government advice on shielding and the categorization of high-risk staff changed as the pandemic evolved. At the time when the claimant requested furlough, people who were pregnant were being advised to shield under the Scottish Government guidance. Those, like the claimant, who were living with a household member who was shielding were not required to adopt shielding themselves but were advised to follow the government guidance on social distancing.

35. Just Eat resumed its operation in the latter half of May 2020. The claimant's status with Just Eat was one of self-employment. He enquired whether he would be eligible to obtain a government grant support instead of returning to work for Just Eat. He discovered, however, that he was ineligible for such funding because he had only commenced work with Just Eat in February 2020. Without grant support in lieu of that source of income, the claimant felt unable to provide adequately for his family.

36. The claimant referred to the government guidance on the furlough scheme and noted that he was able to be furloughed by one employer while continuing to work for another.

37. He considered that the arrangements with Just Eat carried less risk of Covid infection. He did not require to work in-store for Just Eat outlets at any time, whereas he often had to work in store for the respondent. While working for Just Eat, he spent virtually all of his time in his own car. When working for Just Eat, there was no cash-handling and all payments were contactless. The respondent, in contrast, paid his expenses in cash each night.

38. When working for Just Eat, the claimant used his own phone to receive instructions about orders and delivery addresses. When working for the respondent he required to use one of their phones for GPS data. These were not dedicated to individual drivers but allocated at the beginning of, and sometimes, during shifts. When working for Just

Eat, he used his own dedicated hot bag to transport food. When working for the respondent, the same hotbag would sometimes be used by different drivers in the course of a shift. Under the arrangements with Just Eat, he was provided with the food orders outside the relevant restaurant and did not require to enter as he sometimes had required to do when working for the respondent after the pandemic struck.

39. In late May or early June, the Claimant began doing shifts for Just Eat in Ayr. He did one shift of two to three hours in the evening, five days per week. He continued to be furloughed by the respondent. He did not contact the respondent to advise that he was undertaking shifts for Just Eat. In June 2020, he worked approximately 15 to 21 hours per week for Just Eat.

40. On 19 June 2020, RH called the claimant and asked him if he was working for Just Eat. When the claimant confirmed he was, RH said words to the effect that higher management had said that the claimant would have to either quit working for Just Eat or face dismissal by the respondent. The claimant asked RH to put communications in writing via email.

41. The claimant was subsequently invited to a disciplinary investigation meeting. He was informed that RH would carry out the investigation and that David Cameron, Area Manager, would attend in his capacity as note taker.

42. The meeting took place on 14 July 2020 in a small office at the Ayr store, the door of which carried a notice that only two people should be in the room at one time. Three people were in attendance, as the invite had envisaged.

43. At that time, the requirement to wear masks had not been mandated by the Scottish Government nor indeed by the respondent. The claimant attended the meeting wearing a face mask. Neither RH nor David Cameron wore masks. David Cameron asked the claimant to remove his mask.

44. During the meeting, Mr Cameron took a more active role than that of notetaker. He challenged the claimant on his work with Just Eat. He left the meeting abruptly on more than one occasion without explanation. It appeared he did so to make calls to discuss the claimant's situation. On one occasion, when he returned he showed the claimant

an article in the Sun newspaper on his smart phone which, he suggested, lent support to his view that the claimant should be working for the respondent and should not be furloughed. The claimant, in turn, showed him government guidance on the internet which he had called up on his phone. He also provided hard copies of guidance he had printed prior to the meeting which confirmed that, when on furlough leave, employees could work for other employers. Nonetheless, Mr Cameron told the claimant that "if you're furloughed, you're furloughed from everywhere."

45. The claimant answered all the questions put to him. He confirmed he was working for Just Eat and advised the respondent of his shift pattern. He told the respondent about the differences in their working practices which made him feel more secure than he had felt under the arrangements initially in place with the respondent.

46. Mr Cameron told the claimant he was being investigated for gross misconduct. The claimant requested a copy of the staff handbook. He asked to see the handwritten notes Mr Cameron had taken at the conclusion of the meeting and Mr Cameron refused. He said "Oh, you think we'll change the minutes?" The claimant explained this was not his concern, he simply wanted to check them. He was not permitted to do so.

47. Shortly after that meeting, in the middle of July 2020, the claimant began working for Uber Eats as a driver as well as Just Eat. He used Uber Eats to plug 'idle time' during his shifts for Just Eat (for which he was paid per job as opposed to an hourly rate). The claimant had joined the Uber Eats drivers' platform in February 2020 at the same time as joining the platform for Just Eat drivers but Uber Eats did not become operational in Irvine until mid-July, so the claimant did not work for them until that time. In July and August 2020, the claimant worked approximately thirty hours per week for Just Eat and Under Eats in the evenings. His shifts varied, depending on what was available. He sometimes did shifts between 8 and 11 am, sometimes between and 4 and 7pm, and sometimes between 4.45 and 11.45 pm. The working practices in place for delivery drivers for Uber Eats at the time were similar to those in place for Just Eat, described above.

48. On 28 July 2020, the claimant received a letter from the respondent, inviting him to attend a disciplinary hearing. The letter indicated the purpose was to consider an alleged "breach of trust" and "fraudulent actions". It stated:

> *"we believe your behaviour to be a lack of respect towards the company in line with our policies and standards and I would like to hear your response to the allegations before I make a decision with regards to any disciplinary sanction.*
>
> *Your actions have potentially damaged the level of trust and confidence between yourself and the Company. This would be in breach of your terms and conditions of employment, if proved.*
>
> *…*
>
> *You should be aware that this is a serious matter which the Company considers to be potential Gross Misconduct which may result in your dismissal without notice."*

49. The letter came with enclosures. These included notes of the investigatory meeting with the claimant as well as well as handwritten witness statements by SC, Sophia Wright and Graham Frame. An extract from the respondent's handbook was included, as well as an investigation report prepared by RH.

50. Sophia Wright's statement included the following paragraph:

> "Sohail mentioned his wife was pregnant and she was considered a high risk individual for Covid 19. He explained how some companies were furloughing those who lived with high risk individuals and therefore he asked me to email Gabrielle to find out if he was eligible. At this point, as far as I'm aware, he was only working full time with us"

51. Ms Wright did not give any evidence in her statement to the effect that the claimant had told her he personally needed to shield.

52. Neither Graham Frame nor SC indicated in their witness statements that the claimant had told them that he required to shield personally or that he could not leave his home.

53. RH's investigation report contained a section headed "Findings" as follows:

> ""I feel that Sohail has clearly misled the business by requesting to be furloughed to allow him to shield for the health benefits of his wife and unborn child. The store has been open throughout this period and Sohail's job has been required at all times. He has continued to work in his second job which is contrary to his request to shield.
>
> There is a resulting breach of trust from these behaviours.
>
> In addition, I feel if you had concerns about the procedures in place then you could of [sic] highlighted these & we could of [sic] made adjustments to help control this for your situation."

54. The final section, headed "Conclusion" was in the following terms:

> "ALLEGATION 1
>
> I feel there is enough evidence to demonstrate a Sohail behaved in a fraudulent manner by misleading the business with his shielding request and then continuing to work for his secondary employer.
>
> ALLEGATION 2
>
> I feel there is enough of a breach of trust to progress to disciplinary action"

55. On 3 August 2020, the claimant sent an email in which he asked Mr Maxfield to approach additional witnesses on the issues he had raised about Covid security in the store while he was still working in the early stages of the lockdown. He asked him to obtain statements from Sophia Wright, Graham Frame, Stephen Cope and Michael McElroy ("MM"). In the event, Mr Maxfield only obtained follow up statements from Mr Frame and SC, he did not approach MM to request a statement. It is not known whether he approached Miss Wright but no statement was prepared by her.

56. The disciplinary hearing took place on 7 August 2020. The claimant was given copies of the additional statements from SC and Graham Frame at the hearing. SC

acknowledged in his statement that staff needed constant reminding about the two-metre rule.

57. The Respondent's Area Manager, Chris Maxfield, chaired the disciplinary hearing and Amy Paul attended as notetaker. The claimant showed Mr Maxfield the excerpt from the Staff Handbook quoted at paragraph 17 above. He asked Mr Maxfield if he was contractually allowed to work for another employer. He asked what was meant by "hours of work" in the following passage:

You must devote the whole of your time and attention and abilities during your hours of work to the Company. You must not, whether directly or indirectly, undertake any other duties whatever kind [sic], during your hours of work.

58. Mr Maxfield told him this meant "from when clocked in till clocked out".

59. The claimant then referred to the last sentence in the handbook excerpt as follows:

You may not, during the course of your employment, work for any business or company that is directly in competition with the Company.

60. The claimant pointed out that Just Eat did not do deliveries for any other pizza company and asked if they were a competitor, to which Mr Maxfield replied, "my understanding is it is still a fast food environment".

61. During the hearing, the claimant discovered that the copies of the government guidance he had supplied at the investigation meeting which confirmed furloughed employees could work for other employers had not been passed on to Chris Maxfield. It was not appended to RH's investigation report or referred to therein.

62. An outcome letter was sent to the claimant on 12 August 2020. He was issued with a final written warning which, he was advised, would be placed on his personnel file and remain active for twelve months. The letter indicated the claimant's explanation was not acceptable and formally warned him about aspects of his conduct which were labelled a "Breach of Trust" and "Fraudulent actions".

63. In an enclosed document, Mr Maxfield set out his reasoning:

"We assumed you were shielding as your wife was viewed as vulnerable and you were both required to self-isolate, and you were furlough [sic] accordingly at your request….

When shielding each household had to where possible remain at home. You are correct that you were allowed to go out for essential trips such as food shopping, Doctors appointments etc but work was not an essential trip.

The government guidance we read stated the following:

"You were advised to 'shield' to protect yourself during the peak of the epidemic when you were more likely to come into contact with the virus in your daily life. The initial shielding guidance advised that you should stay at home at all times and strictly avoid non-essential face-to-face contact"

64. The document did not provide a copy of the guidance printed from the internet or include a hyperlink to its source. Mr Maxfield went on to list certain coronavirus safety measures he said the business had implemented during the pandemic. He concluded:

"I think it is important to highlight that the majority of our team members do have a second job and we are in no way preventing any employee from undertaking work"

65. The claimant emailed Eddie Stimpson (ES) on 19 August 2020 to initiate an appeal against the decision and warning.

66. He attended an appeal hearing on 26 August 2020. The hearing was conducted by ES with Rhona McKerral attending as notetaker. At the hearing, the claimant reiterated that he did not require to shield; it was his wife who was in the shielding category. He repeated that his wife's midwife had recommended that his wife should shield and that he should ask for furlough. He explained that he had made his request to Sophia Wright on this basis. He reiterated the differences between his work for Just Eat and the respondent and the reasons he felt more secure undertaking the type of work he was doing for Just Eat.

67. ES sent the appeal outcome to the claimant on 2 September 2020. The decision was articulated as follows:

"Allegation 1 Fraud

As we discussed at your appeal hearing, as a business we furloughed 40 members of staff at their request. We continued to operate throughout the period and had no required [sic] from a commercial position, to furlough any staff. Our understanding was that an employee who was shielding should remain, where possible at home and not work. As you are aware neither of us can find the correct guidance as all links have been updated to the current guidance position. Given this fact and our mutual inability to locate the guidance that we are referring to, I feel it is only fair to revoke the final written warning.

Allegation 2 Serious breach of trust

As I have revoked the final written warning for allegation one, it has a direct impact on this allegation of serious breach of trust. Therefore I believe that you genuinely did not intend to mislead the business so therefore no breach of trust has occurred.

…. We expect you to contact Raza Hafiz at the Ayr store … to confirm your shifts for next week. We expect you to return to work by 07/09/2020 and this is when your Furlough pay will cease."

68. On 3 September, the claimant replied to ES by email. His communication included the following passage:

> "…I also know as stated in your letter that this decision is final but I have few reservations which I wish to clarify.
>
> First of all, main issue I got is the lack of an unreserved apology from Pizza Cake Ayr as if all allegations are dropped and disciplinary decision has been revoked I think I am due an apology for all the extra stress and ordeal me and my family went through during this process. Here I want to clear one thing this demand is not new in fact in my disciplinary meeting with Chris Maxfield I clearly mentioned that I want all allegations dropped with an unreserved apology and it can be verified by minutes of meeting.

> Secondly I am not that much bothered if my furlough stop at 16/08/20 or 07/09/20 as it's Pizza Cake Ayr's decision but with regard to returning to work from 07/09/20 I think I need some time to assess few things which are, Pizza Cake Ayr's response to my first reservation and in my opinion workplace is somewhere you enjoy spending time along side earning money so with recent events I need to have a brief thinking if I can still enjoy my job the way I enjoyed over past 10 years and at same time our baby is due in a week or so, so at this time I have more important things on my mind hence I will make a decision when to return to work after our child's birth.
>
> I took stand against threatening and bullying behaviour which I experienced right at the beginning of this situation because I want to protect my self-respect and also to protect my rights otherwise I should have handed my notice at start of this issue. I still 100% stand by with my stance that everything I have done is in line with Govt. guidance despite it's not available online anymore. I clarified this to Chris Maxfield as well that my stand is not for furlough money instead it is for my self respect and confronting threatening behaviour hence lack of apology put me at very difficult position. I will consider my return to work date once I have all the relevant things decided and I will take the decision in the best interest of myself and Pizza Cake Ayr.
>
> Kind regards
>
> …"

69. On 8 September 2020, ES responded to the claimant's communication in the following terms:

> … I note your request for an unreserved apology due to the stress and ordeal you have been through as a result of the disciplinary procedure we have followed.
>
> I believe it is very important to highlight that we have followed the ACAS Code with regards to the disciplinary process and procedure. I do recognize this can be very stressful. In addition, we have all suffered additional stress and pressure

> as a result of the pandemic from the CORONAVIRUS. It was and continues to be an ever-evolving situation.
>
> Therefore, I do offer you an unreserved apology for the impact that the processes and procedures we have followed have had on you Sohail.
>
> With regards to the allegation of bullying and threatening behaviour, please be assured I am treating this very seriously. Whilst I acknowledge that no formal grievance has been raised at this stage. I am conducting an investigation, if you wish to, please can I ask that you submit in writing any points you feel have not been discussed or raised during the appeal hearing. I will be in touch shortly to discuss my findings.
>
> As a business we pride ourselves on our family values and a culture of openness and team spirit, which I hope you have seen in your ten years of working with us. I sincerely hope this letter has provided you with the reassurance that we have addressed this situation fully and I look forward to seeing you again soon.

70. The claimant did not find the apology to be adequate. He wished an apology which apologised specifically for accusing him of fraud and a breach of trust.

71. The claimant replied to ES the following day. His response, so far as material, was as follows:

> I never complained about processes or procedures of disciplinary, so I think last night email was irrelevant for what I was looking for. I was quite clear in my email that it's all about allegations of fraud and breach of trust were false and baseless hence I was seeking apology for those allegations of accusing me of fraud and breaching trust.
>
> Anyway I have tried my best to sort things with Pizza Cake but for some reasons things aren't going well so I am not going to ask any further response to my request. I will let my relevant store know about my intentions in 7 working days as I need some time to consider my role and circumstances.

> Lastly thanks for offering investigation into bullying and threatening behaviour but I am not interested in that whatsoever and I haven't and won't make any complain [sic] against anyone and I did tried [sic] not to mention anyone as well, as I was dealing with a corporate not individual.

72. ES did not respond to this email and there was no further communication between the parties until the claimant intimated his resignation, with immediate effect, by a hand-delivered letter on 24 September 2020. The claimant's baby was due on 13th September and was born on 18 September 2020.

73. The claimant's resignation letter included two paragraphs under the heading, 'Reason for my resignation' as follows:

> You should be aware of disciplinary procedure against me for the serious allegations of fraud and breach of trust. As an accuser responsibility always lies with Pizza Cake Ayr …to prove those allegations with evidence and they admitted in appeal decision that they can't get hold of relevant government guidance hence I requested to operational manager Eddie Stimpson after appeal decision that both charges have to be declared false and baseless with a formal apology which got a reply with an apology for processes and procedures instead actual allegations but I never had an issue with disciplinary process. I read the Govt. guidance at the time and I strongly believe everything I done was in line with Govt. guidance. Pizza Cake Ayr's … unwillingness to null and void both allegations against me especially in absence of solid proof against me made me consider my role at Pizza Cake Ayr …Those allegations seriously destroyed trust and confidence between myself and Pizza Cake Ayr … and with loss of trust and confidence between us I strongly feel my role at Pizza Cake Ayr's… is untenable and against my self-respect.
>
> Throughout disciplinary process I was able to prove that none of my actions breached my employment contract or Domino's Pizza Handbook and disciplinary hearing decision was based on assumptions rather than Govt. guidance and that's same guidance I was accused of violating and after appeal hearing those allegations were only dropped as my employer can't get access

> to govt. guidance but it was their responsibility to prove allegations and provide proof for those allegations. Not having a proper clearance of allegations shattered my self-respect and confidence and due to nature of those allegations I strongly feel that my role is untenable to carry on after being wrongly accused and not cleared of Fraud and breach of trust hence I am resigning with immediate effect from today 24th September 2020.

74. It is found that the claimant resigned for the reasons articulated in his letter, and not for some other reason.

Observations on the Evidence

75. The claimant was found to be a credible and reliable witness. There were occasional lapses with reference to dates and the order of events and correspondence. He willingly corrected these on checking contemporaneous documentation. There was a high degree of consistency between the claimant's evidence to the Tribunal and the written records in the bundle; much of what he told the Tribunal was supported by the notes of the investigation and the disciplinary and appeal hearings as well as contemporaneous correspondence between the parties. His complaints about the respondent remained consistent as did his account of matters.

76. On the important question of what he said when he requested furlough from the respondent, the claimant's account accorded with the written witness statement of Sophia Wright to whom the request was directed.

77. The Claimant's witness Michael McElroy spoke principally to the arrangements in the Ayr Store during the period from late March to late April when the claimant was working there. MM was a delivery driver but, like the claimant, he also regularly worked in store. He was a credible witness who gave detailed evidence about his experience at the time. His evidence corroborated that of the claimant with regard, in particular, to the social distancing practices in the store at the time. There was a high degree of consistency between the issues raised by the claimant and MM. As MM now works for Just Eat and Uber Eats he was also in a position to corroborate the claimant's evidence

concerning the practices of these businesses for delivery drivers operating in the claimant's area.

78. The Tribunal had some concerns over the reliability of the evidence of Stephen Cope (SC), led by the respondent. Mr Cope's evidence largely related to the practices in the Respondent's Ayr store following the outbreak of the pandemic and the measures in place. Mr Cope acknowledged that colleagues needed to be reminded to follow the measures. There were, however, areas where is evidence caused concern. Mr Cope's evidence was not always consistent with his own or other evidence.

79. SC gave evidence he recalled Just Eat drivers congregating in inappropriate numbers outside KFC in Ayr after Covid struck but, on cross-examination, he admitted he didn't recall when he observed this and was not in a position to challenge the claimant's account that Just Eat was not operation in the Ayr area until 31st August 2020. His recollection of when employees started wearing masks instore did not accord with the evidence of other witnesses including other witnesses for the respondent. His account that only four people were working on the make line at the Ayr store did not accord with the number recalled either by the claimant witnesses or those of the respondent. Mr Cope later conceded a higher figure in cross-examination.

80. On a number of occasions he was unable to recall matters about which he was questioned. Areas of conflict between his evidence and that of the claimant and / or MM were resolved in favour of the claimant or MM, as applicable.

81. The Tribunal similarly had concerns about inconsistencies and apparent poor recollection in the evidence of the respondent's store manager, Raza Hafiz (RH). RH initially gave evidence that no meetings took place in the office in the Ayr store after Covid struck and reiterated this later in his evidence in chief. Subsequently, he accepted that the disciplinary investigation meeting with the claimant took place there. RH was also questioned about a meeting he held with MM. RH denied any recollection of the meeting more than once. MM's evidence was that Sophia Wright and Graham Frame were also present. When asked by Mr Robinson whether it could have happened or not, RH's response was less than direct; he said he was there to make

sure people followed procedure. Later in his evidence, however, he recalled the meeting, and conceded "it must have been in the office".

82. Conflicts between the evidence of RH and the claimant or MM were resolved in favour of the claimant / MM as applicable. The points of conflict between the claimant's evidence and that of RH which were perhaps most material to the issues for determination by the Tribunal related to (1) an alleged conversation between the claimant and RH the day after he requested furlough from Sophia Wright; and (2) the telephone conversation between the claimant and RH on 19 June 2020.

83. In relation to the former, RH gave initial evidence that when the claimant asked for furlough, he said he could not leave the house and that the midwife had said that the claimant had to shield. He later accepted that the claimant did not, in fact, direct his request to RH at all and that RH was not in the store at the time of the request. He alleged a subsequent conversation at work, however, when the claimant had said he didn't want to put his household in danger. Later again, in re-examination, he said the day after he discussed furlough with Ms Wright, the claimant told RH that he couldn't leave the house because his wife was pregnant. The claimant denied this conversation.

84. The Tribunal did not accept that the claimant told RH he required to shield or that he could not leave the house. Sophia Wright's written investigation statement recorded no such statement by the claimant when he asked her about furlough. Indeed, she commented that the claimant did not intend to take up furlough, even if he were eligible, due to the financial implications. If the claimant had been told he required to shield to keep his wife safe, it would perhaps have been unlikely that he would be undecided about whether to take up furlough, if available. If he had told RH that he was required to shield, it would perhaps have been less than responsible on the respondent's part to require or permit the claimant to attend work to complete his rota'd shifts for the week after his furlough had been agreed by HR. The government guidance did not suggest the claimant required to shield and it seems inherently unlikely that the claimant would have misrepresented the guidance to his employer in this manner, given how easily the respondent could have checked the official position.

85. In relation to the phone call on 19 June 2020, RH accepted that when the claimant confirmed he was working for Just Eat, he had said "You want to keep that job [just eat] or you want to keep the Domino's job?" Even on RH's evidence, the plain implication was that doing both was not an option. The evidence of the claimant is preferred that RH was more explicit and said that higher management had said that the claimant would have to either quit working for Just Eat or face dismissal.

86. With regard to the day-to-day practices in the Ayr Store between late March and late April 2020, the evidence of Denis Smith, Regional Manager, and of Eddie Stimpson, Operations Manager, was less significant, given the nature of their roles. ES did not visit the store during this period and DS carried out only weekly inspections from outside the store itself, looking through the glass frontage. Both spoke to the company level measures and guidance which were introduced in response to the pandemic, to the systems of inspections in place, and to the consequences that non-compliance could potentially entail. However, neither was in a position to meaningfully counter the detailed granular evidence of the claimant and MM as employees "on the ground" as to the level of adherence to that guidance in the early days of the pandemic as staff grappled with the innovative measures alongside the high demand for pizza deliveries experienced in that period.

87. ES also gave evidence in relation to the appeal. There was no material conflict between the evidence given by Mr Stimpson and the claimant about that process and the associated correspondence. The notes of the appeal hearing were agreed by both to accurately reflect what was said.

Relevant Law

'Constructive' Unfair Dismissal

88. Section 95 of ERA defines a dismissal, including what is commonly referred to constructive dismissal in subsection (1)(c):

"**95 Circumstances in which an employee is dismissed**

> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) -
>
> .....
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

89. The onus of proving a constructive unfair dismissal lies with the claimant. The case of **Western Excavating Ltd v Sharp** [1978] IRLR 27 sets out four conditions which must be met to succeed in such a claim:

    2) There must be a breach of contract by the employer, actual or anticipatory;

    3) That breach must be significant, going to the root of the contract, such that it is repudiatory;

    4) The employee must leave in response to the breach and not for some other, unconnected reason; and

    5) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may have acquiesced in the breach.

Implied 'trust and confidence' term

90. In every contract of employment there is an implied term, articulated in the case of **Malik v BCCI SA (in liquidation)** [1998] AC 20 as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

91. In **Baldwin v Brighton and Hove City Council** [2007] IRLR 232, the EAT held that the use of the word "and" following "calculated" in the passage quoted from **Malik** was an erroneous transcription of previous authorities, and the formulation should be "calculated

or likely" (emphasis added). The EAT reaffirmed this modification in **Leeds Dental Team Ltd v Rose** [2014] IRLR 8:

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is to be taken to have the objective intention spoken of…"

92. In **Firth Accountants Ltd v Law** [2014] IRLR 510, the EAT noted that in a case concerning a breach of the implied term of trust and confidence, there must have been no reasonable or proper cause for the employer's conduct for there to be a breach of the implied term. If there was reasonable and proper cause for the conduct, there is no breach of the **Malik** term and no dismissal.

93. The unreasonable bringing of disciplinary proceedings, irrespective of eventual findings, is capable of constituting a breach of the **Malik** term (**Gogay v Herfordshire County Council** [2000] IRLR] 703 and **Working Men's Club and Institute Ltd v Balls** UKEAT/0119/11/LA). An employer should not initiate disciplinary proceedings involving what are presented as allegations of "gross misconduct" without some basis for believing the allegations are well founded and that they might constitute gross misconduct; and that may, depending on the circumstances, require some prior degree of "investigation". The initiation of disciplinary procedures alleging dishonest behaviour without any adequate basis for doing so and the unreasonable conduct of those proceedings are capable of amounting to a fundamental breach of contract in response to which an employee is entitled to resign (**Balls** at para 6.2.2.4).

The 'last straw' doctrine

94. In **Omilaju v Waltham Forest London Borough Council** [2005] 1 All ER 75, the Court of Appeal held that a final straw which is not itself a breach of contract could result in a breach of the implied term of trust and confidence. The essential quality of that act was that, when taken in conjunction with the earlier acts on which an employee relied, it amounted to a

breach of the implied term of trust and confidence. It had to contribute something to that breach, although what it added might be relatively insignificant.

95. Further guidance in so-called 'last straw' cases where resignation is the culmination of a course of conduct comprising several acts or omissions across a period of time was provided by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978:

> "16. Although the final straw may be relatively insignificant, it must not be utterly trivial; the principle that the law is not concerned with very small things … is of general application.
>
> …
>
> 19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> 20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be reasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts and incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour

> may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.
>
> 21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to evoke the last straw principle."

96. In cases where the Tribunal holds that the alleged final straw relied upon by the claimant was not part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the **Malik** term, then the tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the **Malik** term, has not since been affirmed, and contributed to the decision to resign (**Williams v Alderman Davies Church in Wales Primary School** UKEAT/0108/19 para 31 and 32).

Acquiescence / Waiver

97. Where there is a breach, the employee may choose to give the employer the opportunity to remedy it, and generally should not be prejudiced if they delay in resigning until the employer's response to an appeal or grievance is known.

98. In **WE Cox Toner (International) Ltd v Crook** [1981] IRLR 443, the employee was censured by the employer in July 1980 and demanded that the censure letter should be withdrawn through his legal representatives. He was informed on 6 February 1981 that the letter would not be withdrawn and resigned four weeks later. The EAT held he was precluded from claiming for unfair dismissal because he had remained for four weeks after

it became clear his grievance would not be remedied. However, it was accepted, without finally determining the point, that he was not necessarily affirming the contract up to the point of the refusal to withdraw the censure.

99. There have, however, been differing approaches as to whether the use of internal procedures will constitute affirmation (or acquiescence, to use the Scottish term). In **Kaur** (cited above), the Court of Appeal at para 63 said that exercising a right of appeal against what is said to be a seriously unfair disciplinary decision is not likely to be treated as an unequivocal affirmation of the contract.

100. However, in the subsequent Court of Appeal case of **Patel v Folkstone Nursing Home Ltd** [2018] IRLR 924, where an employee successfully appealed against dismissal by the employer,

> '… if the employee exercises his right of appeal under the contract and does not withdraw the appeal before its conclusion, it is obvious on an objective basis that he is seeking to be restored to his employment and is asking and agreeing (if successful) to be treated as continuing to be employed under his contract of employment for the interim period since his previous dismissal and continuing into the future, so that that dismissal is treated as having no effect. It is not a reasonable or correct interpretation of the term conferring a right of appeal that a successful appeal results in the employee having an option whether to return to work or not.

101. In **Patel**, the employee declined to return to work because he was unhappy that one of the two charges against him was not referred to in the appeal outcome. The charge was a serious one. Although the Court of Appeal upheld the EAT's ruling that there had been no dismissal for the purposes of section 95(1)(a), the Court invited submissions from the parties on whether the handling of the contractual appeal might have justified the employee in treating himself as having been constructively dismissed (under section 95(1)(c)).

102. The EAT in **Pheonix Academy Trust v Kilroy** UKEAT/0264/19 considered a scenario where the claimant was summarily dismissed and invoked the respondent's contractual appeal procedure but stated that he did not intend to return if successful. He was then reinstated but issued with a final written warning. The employer contended the claimant

had affirmed the contract by his invocation of the contractual appeal procedure. The EAT, having regard to **Patel**, overturned the Employment Tribunal to hold that he had affirmed the contract in doing so.

103. More recently, in the case of **Gordon v J & D Pierce Contracts Limited** UKEATS/0010/20, the EAT considered contradiction in the authorities. There, the first instance tribunal held there were no breaches of contract but even if there had been, the claimant's decision to invoke the employer's grievance procedure meant he had affirmed the contract. The Employment Appeal Tribunal allowed an appeal against this point, favouring the approach in **Kaur**. Lord Summers opined that:

> "Grievance or appeal provisions may be regarded as severable from the remainder of the contract and capable of surviving independently even through the remainder of the contract is properly regarded as terminated through breach. If the employee succeeds in having their dismissal overturned or the outcome in some other way enables the employee to resume employment, it is open to the employee to then affirm the other terms of the contract. If the employee resumes employment, the right to claim unfair dismissal disappears".

104. Delay will not of itself amount to acquiescence, but it will be an important factor. In **Chindove v William Morrison Supermarkets Ltd** UKEAT/0201/13, a period of six weeks' sickness absence before resigning was held not to amount to affirmation. The EAT said that, as a general principle, a tribunal might be more indulgent towards the period of delay because the need to make a decision one way or the other was arguably less pressing than if the employee was continuing to actually work for the employer.

105. In **Mari (Colmar) v Reuters Ltd** UKEAT/0539/13, the EAT considered the question of whether receipt of sick pay from the employer had a bearing on the affirmation question. This was not considered in **Chindove**. The claimant was off sick for 19 months at the end of which she resigned and claimed constructive dismissal. She had claimed sick pay from the respondent for 39 weeks during this period. The employer relied upon her receipt of sick pay as one of four factors said to affirmation. The EAT analysed previous decisions on the impact of receipt of sick pay and concluded there is no simple rule of law as to

whether receipt of sick pay was or was not a neutral factor; each case will depend on its own particular facts.

Construction of the contract – incorporation of handbook

Communication of Handbook?

106. A question which may arise on the facts of the present case is whether a failure to timeously communicate the contents of a staff handbook to an employee might prevent the incorporation of its terms into the individual employment contract.

107. In the case of **Briscoe v Lubrizol Ltd** [2002] IRLR 607, the Court of Appeal gave some consideration to the question in relation to terms from a handbook which dealt with entitlement to a sickness benefit.

> *"It is also true that the court does not look favourably upon an employer who seeks to restrict his contractual obligations in reliance upon a document (whether by reference to a 'works notice' or an insurance policy) to which the employee is not party and to which his attention has not been specifically drawn, so as to limit a right or benefit which information given in the handbook has led the employee to expect: see the approach in the not dissimilar case of Villella v MFI Furniture Centres Ltd [1999] IRLR 468, in which Judge Green QC, sitting as a judge of Queen's Bench Division, held that a restriction in an insurance policy underwriting a contractual permanent health insurance scheme which stipulated that entitlement to benefit would cease on an employee leaving service did not form part of the claimant's contract, with the result that he was entitled to continue to receive benefits notwithstanding the employer's contention that his employment had terminated"* [para 14]

> *In* Villella*, the judge upheld the primary case advanced for the claimant, that the stipulation that entitlement to benefit ceased on an employee leaving service could not be regarded as having been incorporated by reference in the claimant's contract because there was no evidence that he was shown or saw the policy, or had it drawn to his attention that he could or should read it.*

Zero-hours contracts – Enforceability of Exclusivity Provisions

108. Section 27A of ERA defines a zero hours contract as a contract of employment under which the undertaking to do or perform work or services is an undertaking to do so that is conditional on the employer making work or services available to the worker ; and there is no certainty that any such work or services will be made available to the worker.

109. Under section 27A(3), any provision of a 'zero-hours contract' is unenforceable against the worker if it prohibits the worker from doing work or performing services under another contract or under any other arrangement, or doing so without the employer's consent (S.27A(3) of ERA).

110. Section 27B of ERA confers rights not to be subjected to a detriment or dismissed because the employee has breached a purported provision of the contract which is rendered unenforceable by section 27A. In the present case, no claims are pursued under section 27A of ERA.

Submissions

Cases cited

111. Mr Robinson, for the respondent, cited the following cases in his submissions.

- **Malik v BCCI SA (in liquidation)** [1998] AC 20
- **Western Excavating Ltd v Sharp** [1978] IRLR 27
- **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978
- **Omilaju v Waltham Forest London Borough Council** [2005] 1 All ER 75
- **Working Men's Club and Institute Ltd v Balls** UKEAT/0119/11/LA

112. He set out the classic formulation of the trust and confidence term in **Malik** as subsequently tweaked. He referred to **Kaur** and **Omilaju** in relation to the last straw doctrine and, in particular, the character of the last straw which, Mr Robinson acknowledged need not of itself be unreasonable or blameworthy but cannot be innocuous.

113. He acknowledged that disciplinary proceedings alleging dishonest behaviour may amount to a repudiatory breach of the trust and confidence term, as was held to be the case in **Balls**, but submitted that the present case was distinguishable on the facts. It was reasonable, said Mr Robinson, for the respondent to allege fraud against the claimant, given the basis on which he had requested furlough. He relied on evidence given by RH that the day after the claimant requested furlough in a discussion with Sophia Wright, the claimant had told him that he couldn't leave the house and he didn't want to put his household at risk. Any reasonable employer would have been justified in investigating the matter, in Mr Robinson's submission, because the claimant's work for Just Eat was at odds with the reason he had given for wishing to be furloughed.

114. He invited the tribunal to prefer the evidence of RH over that of the claimant in relation to what was said in the call on 19 June 2020 and the behaviour of David Cameron during the investigatory meeting on 14 July 2020. The tribunal was invited to reject the claimant's evidence about his concerns about Covid security in the Ayr store in the period from late March to late April 2020 before he was placed on furlough leave, and prefer evidence given by the respondent witnesses about the measures in place.

115. He submitted that, therefore, there was no breach by the respondent of the implied term of trust and confidence. However, even if there was such a breach, before the successful appeal and apology, the claimant had affirmed the contract by remaining on the payroll as a furloughed employee. Accordingly, a 'last straw' would be required to revive any breach found to have occurred by the Tribunal. In Mr Robinson's submission, there was no last straw because the apology provided by ES and his failure to respond to the claimant's email of 9 September were entirely innocuous acts. He reminded the tribunal that the issue had to be judged objectively. The apology given was unreserved, he said, and in line with what the claimant had requested. The failure to respond to the final email of 9 September 2020 was innocuous in circumstances where the claimant had specifically indicated he was not seeking a response.

116. Mr Robinson submitted that the claimant's case could only succeed if the Tribunal accepted that the wording of the apology given by ES was calculated or likely to seriously damage the relationship of trust and confidence.

Submissions for the Claimant

117. The claimant, who was appearing in person, elected not to make detailed submissions. He pointed out that his conversation about being placed on furlough was with Sophia Wright, not RH, and he indicated he did not agree with RH's account of the alleged later conversation with him. He further disputed RH's suggestion that he had worked full time for RH, pointing out that he had been employed, rather, by the respondent.

Discussion and Decision

The final straw – lack of adequate apology

118. This is a case where the claimant relies upon a series of acts which cumulatively are said to amount to a breach of the implied term of trust and confidence. The series of acts is said to have begun on 19th June 2020 with the call from RH and thereafter to have included the investigation meeting on 14th July; the terms of the ensuing report received on 28th July; the disciplinary hearing on 7 August; and the subsequent findings and imposition of the final written warning on 12th August 2020.

119. The claimant also complains about a later failure by the respondent to provide an unreserved apology following his successful appeal and his email dated 3 September 2020. Finally, he complains that the respondent failed to provide any further apology following receipt of the claimant's email dated 9 September 2020. The claimant's evidence was that the final straw in response to which he resigned on 24th September 2020 was the lack of an unreserved apology, as well as the accusation of fraud itself (which allegation was first raised in RH's investigation report received on 28th July 2020).

120. In **Kaur**, the Court of Appeal's guidance included the following:

> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does have that effect. … If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the

> earlier conduct in order to determine that the later act does not permit the employee to evoke the last straw principle."

121. An appropriate starting point is, therefore, to determine whether the 'final straw' in this case was in fact capable of contributing to the series of acts which are cumulatively claimed to amount to a breach of the **Malik** term. The appeal outcome was issued on 2 September 2020 and the final written warning was withdrawn on that date. The claimant sent an email on 3 September, specifying his wish for an unreserved apology. On 8 September ES wrote to the claimant, providing an apology, albeit in terms which the claimant did not consider adequate. On 9 September the claimant sent a further email, expressing his dissatisfaction and clarifying he wanted an apology for the allegations accusing him of fraud and breaching trust. In that email, he said:

> "… I am not going to ask any further response to my request. I will let my relevant store know about my intentions in 7 working days as I need some time to consider my role and circumstances."

122. At that time, as the respondent was aware, the claimant's wife was imminently due to give birth. He had reminded the respondent of this most recently in his email of 3rd September when he had said this:

> "… I need to have a brief thinking if I can still enjoy my job the way I enjoyed over past ten years and at the same time, our baby is due in a week or so, so at this time I have more important things on my mind hence I will make a decision when to return to work after our child's birth"

123. Mr Robinson maintained that the failure of the respondent to respond to the final email of 9 September 2020 was an entirely innocuous act in circumstances where the claimant had specifically indicated he was not seeking a response. The Tribunal agreed with this submission. An apology had previously been proffered. It was known by the respondent that the claimant's wife had kept poor health in pregnancy and that the birth was imminent. The respondent had been told that the claimant 'had more important things on his mind'. In those circumstances, assessing the matter objectively, the

decision of ES not to respond further to the claimant's email of 9th September, having been asked by the claimant not to do so, was an innocuous act.

124. In reaching this conclusion, the Tribunal reminded itself that the last straw act need not be unreasonable or blameworthy and it need not, in and of itself, amount to a breach of the implied term of trust and confidence (**Omilaju**; **Kaur**). Nevertheless, the last straw must contribute something to the breach; when taken in conjunction with the earlier acts, it should amount to a breach of the implied term of trust and confidence – though what the last straw adds may be relatively insignificant.

125. It would be unduly restrictive to limit the analysis of the final straw to the failure to respond to the email of 9th September in isolation. In his email of 3rd September 2020, the claimant made it clear he wished an unreserved apology and that he wished to defer consideration of his return to work until after assessment of the respondent's response to what he referred to in his email as his "first reservation" (i.e. the lack of an unreserved apology). He did not set out specifically the wording he wanted. He indicated, however, that he thought he was due an apology "*for all the extra stress and ordeal me and my family went through during this process.*"

126. The apology given by ES on 8 September was as follows:

> "Therefore, I do offer you an unreserved apology for the impact that the processes and procedures we have followed have had on you Sohail."

127. The question arises whether this apology, perceived inadequate by the claimant, was capable of amounting to a last straw in response to which he was entitled to resign on 24th September 2020. Mr Robinson's submission was that it could not. The Tribunal did not accept his assertion that the claimant's case could only succeed if the Tribunal accepted the wording of this apology was calculated or likely to seriously damage the relationship of trust and confidence. The last straw does not in and of itself require to breach the implied term of trust and confidence. It does, however, require to contribute something to a breach.

128. The Tribunal was not persuaded that the letter of 8th September and the apology within it contributed anything to an alleged cumulative breach of the implied term of trust and

confidence. The claimant had previously been informed in the appeal outcome letter on 26 August that the originally disciplinary decision had been revoked and that the final written warning would now be removed from his personnel file. The apology on 8th September may not, in the event, have satisfied the claimant but it did not, objectively, form part of a course of conduct which cumulatively amounted to a repudiatory breach.

129. It transpired in the claimant's later email of 9th September and in his evidence to the Tribunal that the apology he said he felt he was due in his email of 3rd September was not, in fact, the apology he wanted. He said he felt he was due an apology for the stress and ordeal caused by the process but, in fact, he wanted an apology for the making of the accusations of fraud and breach of trust. The respondent took his email of 3rd September at face value and gave an apology for the impact of the process upon him. It is recognised that the final straw need not be of the same character as the earlier acts or omissions relied upon, but the tribunal is not satisfied that the respondent's compliance with a request for an apology contributes anything, however insignificant, to the alleged cumulative breach.

Earlier Conduct

130. That is the end of the matter. In **Williams**, it was pointed out that, even where it is held that the final straw relied upon did not form part of a course of conduct amounting to a repudiatory breach of the **Malik** term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed such a breach, has not since been affirmed, and contributed to the decision to resign.

131. The Tribunal accepted the claimant's evidence that he resigned in response not only to the absence of an apology but to the accusations of fraud. Two further questions, therefore, arise:

i. Did the earlier series of acts and omissions relied upon cumulatively breach the **Malik** term? and

ii. If so, did the claimant acquiesce in any such breach prior to his resignation on 24 September 2020?

*Breach of **Malik** term?*

132. The acts and omissions relied upon by the claimant are considered in turn. Mr Robinson's submission was that these neither individually nor cumulatively breached the **Malik** term. His submission was largely premised, however, on his invitation to the Tribunal to prefer RH's evidence on various matters. As set out above, the Tribunal declined to do so.

a. Telephone call by Raza Haviz on or about 19 June 2020

The Tribunal has found that during this call, RH asked the claimant if he was working for Just Eat and, when he confirmed he was, RH told him higher management had said the claimant would have to either quit working for Just Eat or face dismissal. The Tribunal has no hesitation in holding that this act amounted to a breach of the **Malik** term. It was likely to destroy the relationship of trust and confidence which ought to have existed between the respondent and the claimant. There was no reasonable or proper cause for RH's ultimatum.

The claimant was employed on a zero-hours contract with the respondent for the purposes of section 27A of ERA. Any provision of that contract was, by virtue of subsection 3 of that Act, unenforceable against the claimant if it prohibited him from doing work or performing services under another contract or under any other arrangement, or doing so without the employer's consent. Even assuming the respondent is not precluded, applying **Briscoe**, from relying upon the handbook, the prohibition therein on working for a competitor was, in any event, unenforceable pursuant to section 27A(3).

Mr Robinson submits it was reasonable for the respondent to launch an investigation because the claimant working elsewhere was at odds with the reason given for the furlough. That submission is considered below in the context of the subsequent acts relied upon by the claimant but for the purposes of the initial call with RH, it is not accepted to be relevant.

On the facts found, RH did not say that the respondent proposed to investigate an apparent disparity or potential misrepresentation by the claimant. He gave the

claimant a stark choice: quit Just Eat or face dismissal by the respondent. The matter must be assessed objectively. It has been found that the claimant had not told RH or anyone else that he was subject to a government recommendation to shield and remain at home. He was not subject to such a recommendation. There was nothing in the rules of the Coronavirus Job Retention Scheme in place at the material time which prevented the claimant from undertaking work for another employer while furloughed by the respondent. The respondent's case is that they would not have granted the claimant furlough leave if they had appreciated that he would subsequently take up work with another business or businesses. That may be so, but it did not provide reasonable or proper cause for RH to issue the ultimatum he did in the call with the claimant on 19 June 2020.

b. *Allegedly aggressive conduct of David Cameron, Area Manager, during the disciplinary investigation meeting with the claimant on 14 July 2020*;

The claimant complained about aspects of the behaviour of Mr Cameron, the designated notetaker at this meeting. There were a number of facets to the complaint.

i. Mr Cameron asked the claimant to remove his mask. At the time, the use of face masks was not mandated either by the government or by the respondent. However, the investigation meeting was held in a room which, according to the respondent's own guidance displayed on the office door, should only have been occupied by two people to maintain distancing. The respondent knew the claimant had requested furlough leave because his wife was in a high-risk category.

ii. Mr Cameron left the meeting abruptly without explanation when he was supposed to be taking notes on more than one occasion.

iii. Mr Cameron exceeded his role as notetaker and sought at times to lead the discussion in an adversarial manner. When the claimant pointed out that the government guidance permitted work elsewhere, Mr Cameron responded: '*if you're furloughed, you're furloughed from everywhere*.'

Objectively, this was wrong and likely to contribute to a loss of trust and confidence on the part of the claimant in the respondent and their process.

iv. Mr Cameron refused unreasonably to let the claimant see the notes taken

Cumulatively, the Tribunal holds that Mr Cameron's approach in the respects listed contributed to a course of conduct by the respondent which breached the **Malik** term.

c. *The findings and conclusions in RH's investigation report of 28 July 2020 that the claimant had behaved in a fraudulent manner and breached the respondent's trust*;

RH's investigation report was sent under cover of an invite to a disciplinary hearing. This invite referred to allegations of 'breach of trust' and 'fraudulent actions' and indicated the respondent regarded these as potential gross misconduct which could result in dismissal without notice. RH's enclosed report included the following passages:

I feel that Sohail has clearly misled the business by requesting to be furloughed to allow him to shield for the health benefits of his wife and unborn child. The store has been open throughout this period and Sohail's job has been required at all times. He has continued to work in his second job which is contrary to his request to shield.

…

"ALLEGATION 1

I feel there is enough evidence to demonstrate a Sohail behaved in a fraudulent manner by misleading the business with his shielding request and then continuing to work for his secondary employer.

ALLEGATION 2

I feel there is enough of a breach of trust to progress to disciplinary action"

The initiation of disciplinary procedures alleging dishonest behaviour without any adequate basis for doing so and the unreasonable conduct of those proceedings are capable of amounting to a fundamental breach of contract (**Balls**). Mr Robinson submitted that it was reasonable for the respondent to accuse the claimant of fraud, given the basis on which the claimant had requested furlough. He founded on a conversation RH alleged took place the day after the claimant requested furlough from an assistant manager when the claimant said he could not leave his house. However, the Tribunal rejected that evidence.

There was no objective basis for RH to conclude there was evidence to demonstrate the claimant had behaved in a fraudulent manner and had misled the business. On the contrary, the evidence he had collated indicated the opposite. Sophia Wright, to whom the claimant spoke about his furlough request, had given RH a statement that the claimant told her his wife needed to shield. RH had obtained no evidence that the claimant told her that he himself needed to shield. The evidence RH gathered also demonstrated that the assistant manager, Mr Frame and the shift manager, SC, both knew that the claimant had, before lockdown been working for other businesses. Both they and Ms Wright knew that, at the time the claimant made the request for furlough leave, he was not working for Just Eat (which had suspended its operations). Ms Wright did not suggest in her statement that the claimant had given any undertaking not to do so in the future. Indeed, had he done so, the agreement would have been unenforceable under s 27A(3) of ERA. The claimant did not mislead Ms Wright or anybody else regarding his request for furlough. Nor had RH uncovered any evidence through his investigation to suggest he had done so.

The allegation of dishonest behaviour in the form of so-called "fraudulent actions", without any adequate basis for making such an allegation amounted to a repudiatory breach of the **Malik** term.

d. *The upholding of the allegations against the claimant by the respondent's Chris Maxfield following a disciplinary hearing on 7 August 2020 and the issue of a final written warning on 12 August 2020*;

After the hearing, Mr Maxfield upheld allegations of breach of trust and fraud. His rationale for doing so appears to be set out in these words:

> We assumed you were shielding as your wife was viewed as vulnerable and you were both required to self-isolate, and you were furlough [sic] accordingly at your request

He goes on to quote guidance aimed at individuals in the shielding category, which says that those individuals should stay at home at all times and strictly avoid non-essential face-to-face contact.

For the reasons set out earlier, there was no objective basis for an allegation of fraud much less a finding that the claimant had committed fraud and breached the respondent's trust and confidence. Such a finding, and the sanction of a final written warning was calculated or likely to destroy the relationship of trust and confidence. The respondent did not have reasonable or proper cause to act in this manner. It based the finding on an apparent assumption as opposed to any evidence that the claimant had actually misrepresented matters. The finding also appears to have been based on guidance which had no application to the claimant who was not himself in the shielding category by virtue of his wife's classification.

e. *The alleged failure by Chris Maxfield to access Government Guidance on the furlough scheme rules and his failure to take into account the claimant's alleged concerns about Covid security in the Ayr store in coming to this decision;*

Finally, the claimant relies upon Mr Maxfield's failure to access appropriate government guidance on the furlough rules and to take into account the claimant's concerns, reported at the disciplinary investigation hearing and disciplinary hearing about Covid security risks at the Ayr store.

The issue of government guidance has been discussed in the preceding section. The failure to access and refer to the relevant guidance undoubtedly contributed to the objectionable conclusions reached following the disciplinary hearing, which in turn has amounted to a breach of the **Malik** term.

With regard to the issue of Covid security in the Ayr store at the material time, the claimant's case is not that the respondent breached the **Malik** term by taking inadequate Covid security measures *per se*. The tribunal does not make such a finding and is not asked to do so. Rather, the claimant's case is that one contributor to a cumulative breach was Mr Maxfield's failure to take proper account of the distinction the claimant drew between working for the respondent and working for Just Eat.

The Claimant had sought a government grant to avoid returning to work for Just Eat but was ineligible because he had only begun working for this business in February 2020. When Just Eat resumed its operation in the area in late May 2020, he weighed up the risks associated with working for JE and the financial implications of declining to return. A significant differentiator between the work for Just Eat and that undertaken for the respondent was that, when working for Just Eat, the claimant remained in his own car and did not require to work within the premises of the outlets for which he was carrying out deliveries. In contrast, when working with the respondent, he regularly undertook duties in-store where he was trained on most tasks including working on the make line. His role with the respondent was not confined to that of delivery driver, as it was for Just Eat. Regardless of the measures put in place by the respondent and the adherence of colleagues to them or otherwise in the early days of the pandemic, there was inherently less risk in the claimant's role for Just Eat where he spent the majority of his time in his own vehicle.

The claimant was not restricted from working for Just Eat either contractually or by any rule of the Government's Coronavirus Job Retention Scheme (the furlough scheme) or by any Government guidance directed at those living with an individual in the shielding category. Mr Maxfield's conclusion that the claimant's explanation

"was not acceptable" in his letter of 12th August 2020, among other matters, indicated an unreasonable failure to take into account the claimant's representations about the different nature of the working environment and the various distinctions between the working practices as they affected the claimant. There was no reasonable or proper cause for this failure which contributed to the respondent's cumulative breach of the **Malik** term.

Acquiescence

133. Having found that the respondent did breach the trust and confidence term by the series of acts and omissions set out above, it is necessary to consider whether the claimant acquiesced in the breach prior to his resignation on 24 September 2020. The Final Written Warning was issued on 12th August 2020. There is no need to focus on the prior period because the imposition of the warning was capable of effectively 'reviving' any previous conduct even if there had been prior acquiescence (on which no finding is necessary).

Did the claimant acquiesce in the breach or, to use the English parlance, affirm the contract, in the period between 12th August 2020 and 24th September 2020?

134. During this period, the claimant continued to receive furlough pay throughout but, given his furlough leave, did not carry out any work for the respondent. He intimated his appeal on 19 August. The appeal hearing took place on 26th August and the outcome, overturning both allegations, was issued on 2nd September. On 3rd September he reiterated a wish for an apology which was supplied on 8 September. On 9th September, the claimant expressed his dissatisfaction with the terms of that that apology but asked for no response. He indicated in that email that he would let the respondent know his intentions within seven days. He did not. On 24 September 2020, he resigned with immediate effect.

The Appeal Process (19 August to 2 September 2020)

135. Mr Robinson's submission was that, prior to the issue of the apology on 8th September and the earlier withdrawal of the charges, the claimant had affirmed the contract. He said this was so for two reasons. Firstly, significance was attached to the claimant's evidence before the Tribunal that, in this period, he remained amenable to returning to work if he received the apology to which he believed himself entitled. Secondly, Mr Robinson said the claimant's affirmation of the contract was demonstrated by his continued status on the respondent's payroll, benefiting from furlough pay. In the absence of a subsequent 'valid' last straw, Mr Robinson's submission was that the claimant could not rely on the respondent's earlier conduct.

136. The Tribunal was not persuaded by the submission that the claimant's willingness to potentially return to work pending a satisfactory conclusion to the appeal process meant that he affirmed the contract of employment. The question arises whether the instigation of and participation in an appeal process amounts to affirmation of the employment contract, precluding rescission by an employee in the absence of a further breach or final straw. The Tribunal considered the authorities on this question and noted the apparent divergence between the approach of the Court of Appeal in in **Patel** (followed by the EAT in **Phoenix Academy**) and the Court of Appeal's dicta in **Kaur** (followed by the EAT in **Gordon**).

137. **Patel** and the **Phoenix Academy Trust** both dealt with appeals against dismissal pursuant to contractual appeal procedures. They substantially turned on the principle that where there is a contractual right to appeal against dismissal, it is implicit that if an appeal is lodged, pursued to its conclusion, and is successful, the effect is that the parties are bound to treat the employment relationship as having remained throughout. These judgments founded on a well-established line of authorities on what is colloquially referred to as the 'vanishing dismissal' (**Salmon v Castlebeck Care (Teesdale Ltd)** [2015] IRLR 189, **West Midlands Cooperative Society v Tipton** [1986] IRLR 112 and **Roberts v West Coast Trains Ltd** [2004] IRLR 788).

138. In **Patel,** the claim had, in the lower tribunals, been analysed as one of unfair dismissal under section 95(1)(a) of ERA. Although the Court of Appeal concluded that there was no dismissal for the purposes of that section because of the successful appeal, it

opened the door to the possibility of a constructive dismissal claim under section 95(1)(c). Submissions were invited from parties on that issue. The factual context there was that, although the appeal was successful, its management was unsatisfactory in that it failed to deal with a serious charge. The EAT in **Phoenix Academy** considered a resignation and constructive dismissal claim following a successful contractual appeal against dismissal. Heavy emphasis was placed on the observations of Sales LJ in **Patel**, leading the EAT to conclude that the adoption of the contractual appeal process amounted to affirmation, notwithstanding the employee's protests that he had no intention to return at the outset of that process. Although the employer succeeded on the affirmation point, the EAT also remitted this case back to the ET consider the possibility of a fresh breach or last straw arising from the handling of the appeal process.

139. The doctrine of the 'vanishing dismissal' and associated implications for affirmation has no application of the facts of the present case. The respondent's appeal procedure was not contractual and, as the claimant was appealing against a warning rather than dismissal, there was no question that the employment relationship continued throughout the appeal.

140. The Tribunal prefers, therefore, to follow **Kaur** and **Gordon** which did not turn on the vanishing dismissal doctrine. Like the present case, **Kaur** was concerned with an alleged constructive unfair dismissal following an appeal against a final written warning. Lord Underhill did not find the argument that the act of appealing itself might negate the entitlement to resign terribly troubling. He said:

> "exercising a right of appeal against what is said to be a seriously unfair disciplinary decision is unlikely to be treated as an unequivocal affirmation of the contract and, even if it were, its upholding of the appeal would revive the employee's right to resign" (para 63).

141. Regarding the latter point, in **Kaur** the employee's appeal was unsuccessful and the warning was upheld. This distinction meant there was scope there for a last straw to revive earlier conduct which scope does not exist in the present case. In **Gordon v J &D Pierce** UKEATS/0010/20/SS, Lord Summers considered that **Kaur** and **Patel** could

not be reconciled but preferred **Kaur**. Lord Summers interpreted **Kaur** as authority for the proposition that the position will usually be that 'whatever the outcome of the appeal, the decision to appeal should not be taken to affirm the contract' (para 21).

142. The Tribunal identified no unusual features in the present case which would warrant a departure from the broad principle enunciated in **Kaur** and **Gordon** that participation in an appeal process shouldn't be taken as affirmation. It is held that there was no affirmation or acquiescence in the respondent's breach in the period up to and including 2 September 2020.

Period post-appeal outcome (2 – 24 September 2020)

143. A difficulty for the claimant in this case is that he did not resign for a further three weeks after the favourable appeal outcome. That outcome and subsequent apology did not supply him with a further breach or a 'final straw'. As observed by Lord Summer in **Gordon,** '*If the employee succeeds in having their dismissal overturned or the outcome in some other way enables the employee to resume employment, it is open to the employee to then affirm the other terms of the contract. If the employee resumes employment, the right to claim unfair dismissal disappears*' (para 22). The claimant continued to be employed after the appeal outcome and received furlough monies. From 2nd September, it was known that the decision was final, that the warning had been withdrawn, and that the allegations had been overturned. From 8th September, it was known that he had received an apology and that no further response would be forthcoming, none having been requested.

144. The Tribunal concludes that, in failing to resign following the appeal outcome and the respondent's response to the claimant's apology request, he acquiesced in the respondent's earlier breaches and affirmed the contract by remaining on the respondent's payroll and accepting furlough payments for the further weeks that he did so.

145. It is recognised that delay of itself will not usually amount to affirmation in other circumstances but Lord Summer's dictum in **Gordon** does not indicate scope for further

latitude for delay following a successful appeal. Consideration was given to whether the claimant's communication of 9th September 2020 may have avoided an affirmation of the contract. It is not clear from Lord Summer's guidance that it remains open to an employee following the resolution of an appeal in a manner favourable to him to nonetheless continue in employment without affirming by expressly reserving his right to accept the respondent's repudiation. Even if this remains possible, in principle, following a successful appeal, it was not accepted that the claimant's email had this effect.

146. The material paragraph is as follows:

> Anyway, I have tried my best to sort things with Pizza Cake but for some reason things aren't going well so I am not going to ask any further response. I will let my relevant store know about my intentions in 7 working days as I need some time to consider my role and circumstances.

147. The Tribunal was not convinced that this was a sufficiently clear reservation of the claimant's right to resign in response to the respondent's breach to avoid affirmation. Following on from the earlier emails in September, his 'intentions' might be read as relating to his return-to-work date.

148. In any event, the claimant did not inform the Ayr store of his intentions within the 7 days specified. He did not intimate his resignation until more than a week after the expiry of that time limit. When the seven days expired, in the absence of further communication from the claimant and against the backdrop of a successful appeal, the Tribunal considers the respondent was entitled to infer that the claimant had decided not to resign but to continue in employment, in circumstances where he continued to accept payment of furlough monies. Staying in employment for such a period starting from the breach itself would be unlikely to have been fatal. However, to continue in employment for a further three weeks after a successful appeal and over two weeks after the issue of an apology is found to be inconsistent with saying that he had not affirmed the contract.

Conclusion

149. It is concluded that, although the respondent breached the trust and confidence term, the claimant latterly acquiesced in the breach and consequently was not constructively unfairly dismissed.

Employment Judge: L Murphy
Date of Judgement: 23 April 2021
Entered in register: 04 May 2021
and copied to parties